STATE OF MICHIGAN

IN THE SUPREME COURT

RALPH KROCHMAL,

Plaintiff-Appellee,

vs

THE PAUL REVERE LIFE INSURANCE COMPANY,

Defendant-Appellant.

Court of Appeals No. 242776

Wayne County Circuit Court No. 00-004378-CK

126997

DEFENDANT-APPELLANT THE PAUL REVERE LIFE INSURANCE COMPANY'S SUPPLEMENTAL BRIEF REGARDING ITS APPLICATION FOR LEAVE TO APPEAL

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Defendant-Appellant The Paul Revere Life Insurance Company ("Appellant" or "Paul Revere") submits this Supplemental Brief pursuant to the Court's Order of June 17, 2005.

I. INTRODUCTION AND STATEMENT OF FACTS

The issue under consideration is whether Guiles v Univ of Mich Bd of Regents, 193 Mich App 39; 483 NW2d 637 (1992), accurately states the law, or whether it should be overruled in favor of the analysis of the Court of Appeals panel in the instant action. But for Guiles, the Court of Appeals panel in this case would have held that the insurance policy's requirement that an insured submit "satisfactory proof of loss" vested in Paul Revere discretion to determine eligibility for benefits, such that its determination could be upset only upon a showing that Paul Revere acted "arbitrarily or capriciously." That opinion was in conflict with Guiles, which determined that an insured's requirement to submit "satisfactory proof" did not vest discretion. For the reasons set out infra, and for all of the reasons set out in Paul Revere's Brief in Support of its Application for Leave to Appeal, Guiles was incorrectly decided, and this Court should adopt the analysis of the Court of Appeals in the present action.

II. ARGUMENT

A. Guiles incorrectly held that a policy's requirement that an insured submit "satisfactory proof" of loss did not vest discretion

The entire "analysis" of this issue in Guiles was relegated to a terse footnote which summarily stated:

> Defendant submits that because the plan requires that a claimant submit a "satisfactory proof" of total disability, the University reserved to itself complete discretion to determine eligibility. We find this argument disingenuous and accordingly reject it. Under Firestone[1], discretion is the exception, not the rule. . . When an employer wishes to retain discretion, it may do so but it must do so clearly. . . . In this case, the language relied on by defendant does

[1]Firestone Tire & Rubber Co v Bruch, 489 US 101; 109 S Ct 948; 103 L Ed 2d 80 (1989).

> not clearly imply that the University shall have the last word on entitlement to benefits.

193 Mich App at 47 n4 (citations omitted). Guiles' treatment of this issue is not only contrary to the numerous opinions that have held the phrase "satisfactory proof" vests discretion, but is also contrary to several canons of construction, and is unsupportable when those well-established canons of interpretation are applied to it.

Before considering those canons, a few preliminary observations are in order. First, courts have consistently and repeatedly held that there are no "magic words" needed for an insurance policy to vest discretion in an insurer to make benefits decisions. The word "discretion" need not be used. See Johnson v Eaton Corp, 970 F2d 1569 1572 (6th Cir 1992) (Supreme Court "surely did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word'").

Second, the fact that a policy could have been phrased in clearer terms does not mean that the terms actually used are not clear enough to vest discretion. See Yeager v Reliance Standard Life Ins Co, 88 F3d 376, 381 (6th Cir 1996) ("[t]he mere fact that language could have been clearer does not necessarily mean that it is not clear enough").

Guiles' analysis is inconsistent with several fundamental principles of construction.

1. Guiles violates the principle that insurance contracts must be construed to give meaning to every word

Klapp v United Ins Group Agency, 468 Mich 459; 663 NW2d 447__ (2003), set out the bedrock principle of insurance contract construction that all words must be given effect and that none be rendered meaningless:

> [C]ontracts must be "'construed so as to give effect to every word or phrase as far as practicable." Hunter v Peal Assurance Co, Ltd, 292 Mich 543, 545; 291 NW 2d 58 (1940), quoting Mandau v

Lincoln Mut Cas Co, 283 Mich 353, 358-59; 278 NW 2d 94 (1938).

* * *

> [C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.

Id at 467-48.

There is an obvious difference between a policy that only requires an insured to submit "written proof of loss" and a policy that requires an insured to submit "**satisfactory** written proof of loss." The latter sets out a qualitative modification on the kind of written proof that is needed to be entitled to benefits, while the former does not. Under Guiles, both clauses are treated as though they are identical, and the word "satisfactory" has no field of operation and is read out of the Policy, which is impermissible under Michigan law.

2. Guiles violates the principle that insurance contracts must be enforced according to their terms

Henderson v State Farm Fire and Cas Co, 460 Mich 348; 596 NW2d 190 (1999), held:

> [A]n insurance contract must be enforced in accordance with its terms. . . . [T]he terms of a contract must be enforced as written where there is no ambiguity.

Id at 354.

Guiles violates this principle, in essence re-writing the agreement to provide benefits not upon the insured's production of **satisfactory** proof of disability, but instead upon production of **any** proof of disability. It is impermissible under Michigan law to judicially re-write the parties' agreement by striking the word "satisfactory," yet that is precisely the effect of Guiles' holding.

3. Guiles violates the principle that contractual terms must be interpreted according to their common meanings

Henderson, supra, held:

> [R]eviewing courts must interpret the terms of the contract in accordance with their commonly used meanings.

460 Mich at 354 (citing Grange Ins Co of Michigan v Czopek, 440 Mich 590, 596; 489 NW2d 444 (1992)).

"Satisfactory" is commonly defined to mean "[g]iving satisfaction; sufficient to meet a demand or requirement; adequate." The American Heritage Dictionary of the English Language. See also The New Lexicon Webster's Dictionary of the English Language ("satisfactory" means "adequate; giving satisfaction"). Guiles violates the principle of applying an insurance contract according to the common meaning of its terms. Paul Revere's obligation to pay benefits is contingent upon the insured first providing proof of loss "giving satisfaction" to Paul Revere, or proof of loss that is "sufficient to meet [Paul Revere's] demand[s] or requirement[s]," or proof of loss that is "adequate" to Paul Revere. Guiles violates the common meaning of the phrase "satisfactory proof of loss," by holding that the word "satisfactory" does not entitle the insurer to determine whether the insured's proof of loss is "adequate," or is "sufficient" to establish the insured's disability. Instead, under Guiles, an insurer is obligated to pay benefits even if the insured's proof of loss is insufficient to meet the insurer's requirements or is inadequate.

4. Guiles violates the principle that an insurance contract cannot be construed to hold an insurer liable for a risk that it did not assume

Henderson, supra, held:

> A court must not hold an insurance company liable for a risk that it did not assume.

Id at 354 (citing Auto-Owner's Ins Co v Churchman, 440 Mich 560, 567; 489 NW2d 431 (1992)). In the present case, Paul Revere agreed to assume the risk of insuring . . . for disability resulting from sickness or injury, but only upon the condition that he first establish that he was disabled based upon "**satisfactory** proof of loss." Paul Revere did not agree to assume the risk of providing benefits based only upon the insured's submission of **any** proof of loss, regardless of whether the proof was satisfactory or not. Guiles' holding makes an insured liable for a risk it did not assume by requiring that benefits be paid based upon any proof of loss, without concern for whether the proof is satisfactory.

B. Courts have repeatedly held that the phrase "satisfactory proof of loss" vests discretion

Subsequent to Guiles' terse footnote on the issue in 1992, legions of courts, including the Sixth Circuit sitting en banc, have extensively analyzed whether an insurance policy's requirement of "satisfactory proof of loss" vests discretion, and have concluded that it does. See eg, Perez v Aetna Life Ins Co, 150 F3d 550, 556 (6th Cir 1998) (en banc); Yeager, supra, 88 F3d at 380-81; and Miller v Auto-Alliance Int'l Inc, 853 F Supp 172, 175 (ED Mich 1997) (discretion where policy pays benefits only "when [insurer] receive[s] notice and satisfactory proof of loss"). See also the numerous cases cited in Paul Revere's Application for Leave to Appeal at 14-18. After Paul Revere filed its Application in this matter, several other courts have held that receiving "satisfactory proof of loss" vests discretion, making review arbitrary and capricious.

West v The Paul Revere Life Ins Co, 2005 WL 1579582 (6th Cir July 6, 2005), dealt with policy language identical to that in this case, saying "that benefits will be granted '[a]fter we receive satisfactory proof of loss.'" West held that the term "term 'we' is sufficient to indicate that it is the insurance company that must receive satisfactory proof of loss," that the "language is therefore sufficient to confer discretion," and that "the arbitrary and capricious standard is thus

appropriate" in reviewing Paul Revere's benefit decision. See also Curran v Kemper Nat'l Ser. Ins, 2005 WL 894840 (11th Cir, March 16, 2005) ("[w]e have held that . . . language requiring the proof be satisfactory . . . is sufficient to convey discretion and to apply the arbitrary and capricious standard of review").

In Panther v Synthes (USA), 391 F Supp 2d 1267 (D Kan 2005), the insurance policy said that "benefits are payable 'when Sun Life receives Satisfactory Proof of Claim'." Id at 1273. Panther noted that "the Tenth Circuit [has] held that this identical language conveyed 'discretion to Sun Life in finding the facts relating to disability,' and thus Sun Life's decisions as a fact finder are required under the arbitrary and capricious standard') (quoting Nance v Sun Life Assur Co, of Canada, 294 F3d 1263, 1269 (10th Cir 2002)).

Guiles' conclusory footnote is out of step with numerous courts, including the Sixth Circuit sitting en banc and several other courts of appeals, that have held that the phrase "satisfactory proof of loss" confers discretion to the insurer.

C. Paul Revere and the Court of Appeals' position does not depend upon the application of ERISA

Appellee has argued that Paul Revere "and the Court of Appeals suggest that Michigan law should embrace wholesale the standard of judicial review which has been adopted by federal courts considering claims filed under ERISA," and that Paul Revere "offers absolutely no reason why this standard should be adopted and applied in this breach of contract action" (Plaintiff-Appellee's Response to Application for Leave to Appeal at 12). Appellee then observes that the arbitrary and capricious standard of review of ERISA-governed insurance contracts derives from ERISA's "trust law" antecedents and as such that standard of review is inapplicable in a non-ERISA context. (Id at 13-14).

Appellee's argument misunderstands Paul Revere's position, and that of the Court of Appeals. The meaning of the words in an insurance document does not change based upon whether the insurance is purchased by the insured's employer (in which case it would be an ERISA-governed plan) or whether it is paid for solely by the insured (in which case it would not be an ERISA-governed plan). The English words used in the document either vest discretion to the insurer to make benefit determinations, or they do not. It is illogical, and indeed nonsensical, to suggest that identical language in two identical insurance documents have different meanings depending upon whether the insurance contract is an employer-maintained employee welfare benefit plan or whether it is an insurance policy paid for by the insured.

In concluding that the phrase "satisfactory written proof of loss" vests discretion, it properly held:

> We acknowledge that Perez and Yeager involved ERISA plans and that the instant case does not. Nonetheless, the reasoning from those cases applies with equal force to the instant, non-ERISA policy. As noted in Perez, supra, at 556, "[t]he general principles of contract law dictate that we interpret the Plan's provisions according to their plain meaning, in an ordinary and popular sense." We find no salient reason why the general principles of contract law should not also apply to the provisions of a non-ERISA plan.

262 Mich App at 134 (citing Bianchi v Automobile Club of Michigan, 437 Mich 65, 71 N1; 467 NW 2d 17 (1991)).

More importantly, and as the Court of Appeals' opinion, supra makes clear, neither Paul Revere nor the Court of Appeals have suggested that "Michigan law should embrace wholesale the standard of review which has been adopted by the federal courts considering claims filed under ERISA." The common law dealing with satisfaction contracts has long provided that where one party's performance is conditioned on its satisfaction with the other party's

performance, judicial review of the party's stated dissatisfaction is limited to whether the party acted arbitrarily or capriciously. Thus, the application of an ERISA paradigm is irrelevant because the result is the same based upon the application of traditional satisfaction contract principles.

The common law of contracts has long recognized that where a contract conditions one party's obligation to perform on its satisfaction with the other party's performance, the party's stated dissatisfaction must control unless it is arbitrary or capricious. Thus, whether the Policy in this action is governed by ERISA or not does not matter. Because the Policy provides that benefits are payable only if the insured presents "satisfactory proof of loss," Paul Revere is not obligated to pay benefits if the proof of loss the insured supplies is not, in Paul Revere's determination, satisfactory. Paul Revere's right to deem an insured's proof of loss "unsatisfactory" is limited in that its determination cannot be arbitrary or capricious, which is the same standard that would apply to an ERISA-governed benefit decision.

Courts outside the context of ERISA have no difficulty enforcing such satisfaction contracts, because satisfaction with the other party's performance is a contractual right that the party has under the agreement. 17 Am Jur 2d Contracts, § 628 describes the general rule applicable to satisfaction contracts:

> There may be a provision in a contract that performance by one party is to be rendered to the satisfaction of the other party. Such a provision has legal effect, and recovery on the contract may be precluded where the performance was not satisfactory to the other party. The term "satisfactory" in a written contract means satisfactory to the other party, even though the contract does not designate the person to be satisfied.

Under well-established contract common law, "one may not act arbitrarily or capriciously to escape liability" under a satisfaction contract by declaring that the party is not satisfied. Id at

§ 629. Hence, a party is not obligated to perform under a satisfaction contract if that party is not satisfied with the performance of the other party, subject only to the limitation that its determination of dissatisfaction is not arbitrary or capricious.

In Bailey v Goldberg, 236 Mich 29; 209 NW 805 (1926), this Court dealt with a satisfaction contract and held that the party to be satisfied was not obligated to perform if dissatisfied with the other party's performance, provided that the party's stated dissatisfaction was not arbitrary. This Court said that "we cannot agree that the defendants would . . . have the right to **arbitrarily** halt the work being done under the contract because of alleged dissatisfaction with it." Id at 31-32 (emphasis added). The trial court charged the jury that "[a]lthough the defendants had the right to terminate the contract if the services rendered by the plaintiff were not satisfactory to them," the "defendants could not **arbitrarily** terminate the contract." Id at 21 (emphasis added). This Court held that to be "a careful, comprehensive, and proper charge." Id at 34.

Nochra Communications, Inc v AM Communications, Inc, 909 F2d 1007 (7th Cir. 1990), held that a party need not perform if dissatisfied with the other party's performance, unless the stated dissatisfaction is capricious:

> Under the law of "satisfaction" contracts, the party for whom performance is rendered may reject if his dissatisfaction is genuine. There is no objective standard. The relevant inquiry is not whether he ought to have been satisfied, but whether he was satisfied. There is, however, one limitation. The dissatisfaction must be sincere and not prompted by caprice or bad faith.

Id at 1011. See also AL Green & Co, v Great-West Life Assur Co, 738 F Supp 965, 972 (WD NC 1990) ("[w]hen a party's contractual obligation is contingent on a unilateral determination that another party's performance under the contract is satisfactory, the unilateral determination must not be made arbitrarily . . . "); Burger King Corp v Austin, 805 F Supp 1007, 1014 (SD Fla

1992) ("a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily [or] capriciously").

Similarly, Stewart v Suburban Mobility Authority for Regional Transportation, 1996 WL 33323464 (7/9/96 Mich App), held in the employment context that a "satisfaction contract is distinct from an at will contract. A party employed at will can be terminated at any time and for no reason; the employer can do so arbitrarily and capriciously. . . . Under a satisfaction contract, an employer may discharge an employee as long as he is in good faith dissatisfied with the employee's performance and behavior. . . ." Id at * 5 (Kelly, J. dissenting). The "employer is the judge of whether the employee's services are satisfactory," and the "dissatisfaction must be real and not pretend, capricious, mercenary, or the result of dishonest design." Id (citing Mitchell v GMAC, 176 Mich App 23, 32; 439 NW2d 261 (1989); Volos, LTD v Satera, 286 A2d 101, 109 (Md App 1972)).

Michigan law has long held that in satisfaction employment contracts, the employer has discretion to decide, in its sole judgment, whether performance has been satisfactory, and that determination must be honored if it is in good faith and is not arbitrary or capricious. See Bracco v Michigan Tech Univ, 231 Mich App 578, 602-03; 588 NW2d 467 (1998) ("[a]n employer may terminate a satisfaction contract if it is in good faith dissatisfied with the employee's performance or behavior," and the "employer is the sole judge of whether performance is satisfactory"); Meagher v Wayne State Univ, 222 Mich App 700, 722; 565 NW2d 401 (1997) (same).

In Schmand v Jandorf, 175 Mich 88; 140 NW 996 (1913), this Court made clear that in a satisfaction contract regarding employment, the satisfaction clause related to the subjective satisfaction of the employer, not the objective determination of a court or jury. To rule otherwise would render the satisfaction clause meaningless. Schmand held:

> It is settled law that, where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury.

Id at 95. Schmand then concluded:

> Had it been the intention that the contract should continue, in case plaintiff should "perform all of his duties [as an employee] and shall serve said first party diligently and according to his best ability in all respects," it would have been quite unnecessary to have added the clause as to the satisfaction of the defendant, and it would then have been a question for a jury whether plaintiff had performed his contract or not. To give the "satisfaction" clause any force, it must refer to the mental condition of the defendant, and not to the mental condition of a court or jury.

Id at 96-97.

Regardless of ERISA's antecedents in the law of trusts, a non-ERISA policy's requirement that an insured submit "satisfactory proof" of loss means under well-established principles of contract law that the party to be satisfied (in this case Paul Revere) has discretion to determine whether the submitted proof is satisfactory, and that determination is limited only in that it may not be arbitrary or capricious. Thus, the Court of Appeals properly held that whether or not the Policy was governed by ERISA did not matter in reaching its conclusion that if the Policy vested in Paul Revere's discretion to make a benefits determination, its determination could only be upset if it was arbitrary or capricious. That result does depend upon importing ERISA trust law into the analysis; it is the same result based upon long-held principles of satisfaction contract jurisprudence.

D. Where a contract is silent regarding who must be satisfied, it can only be understood to have one meaning, which is "satisfactory to the person to whom the material is furnished"

Appellee has asserted that the Policy does not require an insured to submit proof of loss that is "satisfactory to Paul Revere's decision makers," but rather only that the insured submit

"satisfactory proof of loss," and that such a difference is meaningful. He states that because the "plan provision does not specify to whom the proof shall be satisfactory," this "language creates an objective standard – proof 'satisfactory' to a reasonable person" (Appellee's Brief on Appeal at 20). Appellee's argument, made without any legal support, is contrary to courts that have considered the phrase, and is contrary to the common-law of satisfaction contracts.

1. Courts have held that insurance contracts need not designate to whom the proof must be satisfactory in order to vest discretion

Yeager held that the plan unambiguously granted discretion because the plan had only one reasonable meaning, noting that it "would not be rational to think that the proof would be required to be satisfactory to anyone other than" the entity to which it is submitted. 88 F3d at 381.

In the present action, the "satisfactory proof of loss" is furnished only to Paul Revere, who then determines, based on that evidence, whether the insured is entitled to benefits. Being susceptible to only one reasonable interpretation, the Policy is not ambiguous or fatally unclear.

2. The common-law of satisfaction contracts holds that the contract need not designate who must be satisfied.

That insurance policy language need not specify to whom the proof of loss must be satisfactory is born out in cases dealing with "satisfaction contracts" – i.e., contracts which require that items furnished be "satisfactory." In cases where such contracts fail to specify who must be satisfied with service or material furnished under such contracts, it is the majority – if not the unanimous – rule that the only way such a contract can be rationally read is that the party to whom the service or material is furnished is the party that has discretion to determine whether the service or material furnished is or is not "satisfactory."

Campbell Printing – Press Co v Thorpe, 36 F 414 (CC 1888), held that where a satisfaction contract failed to specify which party had to be satisfied, it could **only** be rationally read as meaning that the material had to be **satisfactory to the party to whom it was furnished**.

The contract in Campbell provided that certain presses plaintiff sold to the defendants would be "free from defective material or workmanship, and should do their work satisfactorily," id at 414, without specifically designating to whom they must be satisfactory. The court held that the contract had only one rational meaning – it means satisfactory to the person to whom it is submitted:

> Some doubt is thrown upon this case by the stipulation that the presses shall work satisfactorily, without stating the person to whom they should be satisfactory. We think, however, that **there can be but one interpretation fairly given to these words**. When, in common language, we speak of making a thing satisfactory, we mean it shall be satisfactory to the person to whom we furnish it. **It would be nonsense to say that it should be satisfactory to the vendor. It would be indefinite to say that it should be satisfactory to a third person, without designating the person**. It can **only** be intended that it shall be **satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee**.

Id at 418 (emphasis added).

Numerous other cases have held that where a satisfaction contract does not specify who must be satisfied, such a contract can only be read to mean that it must be "satisfactory to the party to which the material is furnished."

In United States Electric Fire-Alarm Co v City of Big Rapids, 78 Mich 67, 43 NW 1030 (1889), the plaintiff sold a fire alarm bell under a contract which required the common council to pay for it "if found to be satisfactory," id at 70, without specifying who must be satisfied. This

Court held that the only reasonable construction of the contract is that it must be satisfactory to the entity to which it was furnished:

> The reasonable construction . . . is that the City of Big Rapids was not obligated to accept and pay for the fire-alarm furnished by the plaintiff, unless it was satisfactory **to its common council** when tested.

Id at 71 (emphasis added).

Anderson v Sheenhan-Bartling, Inc, 78 SD 530, 105 NW 2d 201 (1960), involved a contract for the sale of certain machines, and provided that "[t]hese machines must prove satisfactory for 10 days," without specifying who had to be "satisfied," or who would determine whether they were "satisfactory." In ruling that it could only be reasonably read to mean "satisfactory to the buyer," the court held:

> The term "satisfactory" in contracts containing provisions of the character under consideration, without designating the person, . . . means satisfactory to the promissor or purchaser.

Id at 202 (citing numerous cases, including Campbell, supra).

In Singerly v Thayer, 108 Pa 291, 2A 230 (1885), a contract for the sale of an elevator provided that it was "[w]arranted satisfactory in every respect," without stating who would judge whether it was satisfactory. 2A at 232. The court held that it could only mean "satisfactory to the person to whom it was furnished":

> The controlling question is what meaning and effect are to be given to the words "**warranted satisfactory in every respect.**" Satisfactory to whom? Certainly not the maker only. Was it to be satisfactory to the person for whom it was to be made and by whom it was to be used? . . . **It would not have been any clearer had it read, "Warranted satisfactory to you in every respect.**" He, therefore, was the person to decide and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. . . . He was the person to test it, or to use it. No other persons could

> intelligently determine whether in every respect he was satisfied therewith.

Id at 232-33 (former emphasis is original; latter emphasis added).

In Williams v Hurshorn, 91 NJ 419, 103 A 23 (1918), the contract provided that the defendant was to pay the plaintiff for waterproofing walls after "a satisfactory test has been made," without specifying who was to be satisfied. The court held that where the contract does not specify who is to be satisfied, it can only be read as meaning the party receiving the service or material:

> When by terms of a contract work is to be paid for after a "satisfactory test has been made," it must be satisfactory to the one who is to pay for it, if, as here, the contract is silent as to the person to whom the work shall be satisfactory.

Manning v School Dist No 6, 102 NW 356, 124 Wisc 84 (1905), similarly held that a contract had provided that payment for a heating plan was due after "the plan was completed, tested and found to work satisfactorily," id at 357, without specifying **who** was to be satisfied, could only be read to mean "satisfactory to the purchaser":

> The natural inference from language in a sale contract stipulating that the subject thereof shall be one of a specified character and be accepted and paid for only upon its proving satisfactory, is that the person to be satisfied is the purchaser; that the words "to the purchaser" or some equivalent words after the word "satisfactory," are to be regarded as a part of the contract by reasonable, if not necessary implication.

In Parr et al v Northern Elec Mfg Co, 593 NW 1099, 117 Wisc 278 (1903), a contract called for the sale of a die which was "not to be accepted unless it operates satisfactorily," id at 362, without stating to whom it must be satisfactory. The court held that "[t]he only meaning which can be logically attributed to this contract is that the machine was to operate satisfactorily to the defendant." Id (emphasis added).

Mechem on Sales, § 664, similarly observes that when a contract does not specify who must be satisfied, it can only mean the entity receiving that which is to be "satisfactory," and that an express statement identifying who must be satisfied is completely unnecessary:

> In many cases it is expressly stipulated that the sale shall not result unless the buyer is satisfied; but this express stipulation is not necessary. When a proposition of sale is made to a person upon the condition that he need not purchase unless the article is satisfactory, the necessary inference, even in the absence of an express statement, is that he need not buy unless the article is satisfactory to him.

Similarly, it is a "necessary inference" that where an insurance policy requires a claimant to submit to the insurer "satisfactory proof of loss", the proof must be satisfactory to the insurer (i.e., the party to whom it is supplied), even in the absence of "to us" language. Because such a provision has only one reasonable meaning, it is unambiguous.

III. CONCLUSION

According to Appellee and the holding of Guiles, the meaning of the phrase "satisfactory written proof of loss" changes depending on whether the insurance policy containing it is paid for by the insured's employer (in which case it would be an ERISA-governed plan vesting discretion), or whether it is paid for by the insured (in which case it would not be governed by ERISA and would not vest discretion). Surely the meaning of policy language cannot undergo such a radical change based upon who pays the policy premiums; English words have meaning, and their meaning is independent of whether they are found in an employer-sponsored employee welfare plan or in a private insurance policy. Neither common sense, nor application of long-standing common law, can support such a result. Guiles was wrongfully decided and should be overruled. This Court should hold that the Court of Appeals correctly concluded that the policy

in this action vested discretion in Paul Revere to make benefit determinations, and that its decision to deny Appellee benefits was not arbitrary or capricious.

Respectfully Submitted,

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Dated: August 5, 2005

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